UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JACOB FRYDMAN, *et al.*,

Plaintiffs,

v. 14 Civ. 5903 (JGK)
14 Civ. 8084 (JGK)

ELI VERSCHLEISER, *et al.*,

Decision

Defendants.

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New York, N.Y.
December 1, 2017
1:30 p.m.

Before:

HON. JOHN G. KOELTL,

District Judge

APPEARANCES

HERRICK, FEINSTEIN LLP
Attorneys for Corporate Plaintiffs
BY: ARTHUR G. JAKOBY

LEWIS GREENWALD CLIFTON & NIKOLAIDIS, P.C.
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BY: AVROHOM Y. GEFEN
ANDREW A. KIMLER

JOSHUA B. SUMMERS (via speakerphone)
Attorney for Defendant Verschleiser

ASHER C. GULKO (via speakerphone)
Attorney for Defendants Verschleiser, Delforno, Pinhasi and Onica

(Case called)

THE COURT: Good afternoon, all. Please be seated.

MR. JAKOBY: Arthur Jakoby of Herrick, Feinstein, for plaintiffs.

MR. FISCHBEIN: Good afternoon, your Honor. Lewis Fischbein for plaintiff Jacob Frydman, and cocounsel for plaintiffs Prime United and -- I'm sorry, Prime United Holdings and United Realty.

MR. JAKOBY: Your Honor, for the record, I am here only for the corporate entities, not for Mr. Frydman.

THE COURT: OK.

MR. GEFEN: Avrohom Gefen, for Albert Akerman.

I just wanted to let the Court know that if the time extends past 2:15, I would have to excuse myself to get home for the Sabbath, but my partner, Andrew Kimler, is here as well.

MR. KIMLER: Andrew Kimler. Both of us are here for defendant Akerman, your Honor.

THE COURT: OK.

MR. SUMMERS: Joshua Summers for defendant Verschleiser.

MR. GULKO: Asher Gulko, cocounsel to Verschleiser companies, Ophir Pinhasi, Raul Delforno and Alex Onica.

THE COURT: OK. There are three motions for summary judgment that are pending. I indicated at an earlier

conference that I would explain my decisions on those motions today.

Let me begin with the motions between the Frydman parties and the Verschleiser parties and then I'll reach the Akerman motion.

This case involves two consolidated actions, United Realty v. Verschleiser, No. 14 Civ. 5903 (S.D.N.Y.), and Frydman v. Verschleiser, No. 14 Civ. 8084 (S.D.N.Y.). As the Court explained in an opinion and order dated March 22, 2016, "these actions are the latest chapter in a long-running and acrimonious dispute between Jacob Frydman and Eli Verschleiser where each party has used judicial and extrajudicial scorched earth practices to torment the other party." Frydman v. Verschleiser, 172 F.Supp.3d 653, 658 (S.D.N.Y. 2016). Familiarity with the facts, underlying claims, and procedural history of this case is presumed.

Before the Court are three motions for summary judgment in these consolidated actions. The first motion is brought by the plaintiffs, Frydman and two entities affiliated with Frydman, United Realty Advisors, LP, known as United Realty, and Prime United Holdings, LLC, known as Prime United Holdings. The second motion is brought by Verschleiser, the Multi Capital Group of Companies, Raul Delforno, Ophir Pinhasi and Alex Onica, who, along with Albert Akerman, are the defendants. The defendants contend that they are unaware of

any entity known as Multi Capital Group of Companies but have responded on its behalf because they believe the plaintiffs have confused it with another entity affiliated with Verschleiser. Delforno, Pinhasi and Onica are former employees of United Realty. A separate motion for summary judgment brought by Akerman is considered separately. For purposes of these cross-motions, references to the defendants do not include Akerman.

Briefly, the record and undisputed representations of the parties indicated following.

From 2011 until December 2013, Frydman and Verschleiser were partners in several business entities, including a broker-dealer Cabot Lodge Securities, LLC ("CLS"); a public nontraded real estate investment trust ("a REIT"), United Realty Trust, Incorporated; adviser to the REIT, United Realty; and a sponsor of the REIT, United Realty Advisor Holdings LLC ("United Realty Holdings"). On December 2, 2013, Frydman sent Verschleiser a letter purporting to terminate Verschleiser's employment with United Realty. Verschleiser claims to have served Frydman with a similar termination letter prior to Frydman's letter. Early on December 4, 2013, Frydman and Verschleiser executed a membership interests sale and purchase agreement (the "agreement") dated December 3, 2013. The agreement rescinded all termination letters by both parties and obligated Verschleiser to return the plaintiffs' computer

servers to their status as of November 15, 2013, and to provide Frydman all owner and administrative passwords to the computer networks by December 5, 2013. The agreement also contained mutual nondisparagement and confidentiality provisions and a nonsolicitation provision directed toward Verschleiser.

The record indicates that Verschleiser did not restore United Realty's computer systems or provide Frydman the passwords by December 5, 2013, as required under the agreement. The plaintiffs have produced evidence purportedly demonstrating that after the execution of the agreement, someone using email and IP addresses associated with Verschleiser hacked into United Realty's computer systems, obtaining and deleting information. The plaintiffs have also produced evidence purportedly showing that someone using an IP address associated with Verschleiser contacted Opera Real Estate ("Opera"), a potential sublessor of office space to the plaintiffs, and disparaged Frydman.

The plaintiffs' claims center around the alleged hacking of their computer servers, the purported damage caused to Frydman's business dealings as a result of disparagement by Verschleiser, the purported theft of trade secrets as a result of the hacking, and breach of the agreement by Verschleiser. Indicative of the acrimonious nature of this litigation, the plaintiffs have spread these claims across 20 counts in their complaint, which includes claims under the Racketeer Influenced

Corrupt Organizations Act, 18 U.S.C. § 1961 et seq. ("RICO"), as well as contract and tort claims under state law. See consolidated second amended complaint (the "complaint").

The plaintiffs move for summary judgment on the defendants' liability for the federal hacking-related claims, breach of contract claims, and state law tort claims for tortious interference with prospective contractual relations, conversion, and misappropriation of trade secrets. The plaintiffs cross-move for summary judgment dismissing all claims in the complaint.

The standard for granting summary judgment is well established. "The Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Darnell v. Pineiro, 849 F.3d 17, 22 (2d Cir. 2017). "The trial court's task at the summary judgment motion stage of the litigation is carefully limited to discerning whether there are genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue resolution." Gallo v. Prudential Residential Servs., LP., 22 F.3d 1219, 1224, (2d Cir. 1994).

In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all

reasonable inferences against the moving party. See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986) (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)); see also Gallo, 22 F.3d at 1223. Summary judgment is improper if there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party. See Chambers v. TRM Ctrs. Corp., 43 F.3d 29, 37 (2d Cir. 1994). The standards to be applied in deciding a motion for summary judgment are well established and need not be repeated here. See, generally, Law Debenture Trust Co. of New York v. Maverick Tube Corp., 595 F.3d 458, 468 (2d Cir. 2010); Scotto v. Almenas, 143 F.3d 105, 14-15 (2d Cir. 1998); Abrams v. RSUI Indemnity Co., No. 16 Civ. 4886 (JGK), 2017 WL 3433108, at *3 (S.D.N.Y. Aug. 10, 2017).

The plaintiff's hacking claims fall under three federal computer crimes statutes -- the Computer Fraud and Abuse Act, 18 U.S.C. §§ 1030 et seq. (the "CFAA"); the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510 et seq. (the "ECPA"); and the Stored Communications Act, 18 U.S.C. §§ 2701 et seq. (the "SCA") -- each of which provides for civil liability for persons harmed by violations of the statutes. The CFAA prohibits, in pertinent part, "intentionally accessing a computer without authorization or exceeding authorized access, and thereby obtaining information from any protected computer." 18 U.S.C. § 1030(a)(2)(C); "knowingly and with

intent to defraud, accessing a protected computer without authorization, or exceeding authorized access, furthering the intended fraud and obtaining anything of value." id. § 1030(a)(4); and "intentionally accessing a protected computer without authorization, and as a result of such conduct, causing damage and loss." id. § 1030(a)(5)(C); see also Sewell v. Bernardin, 795 F.3d 337, 339-40 (2d Cir. 2015). Section (g) of the CFAA provides for civil liability if certain requirements are satisfied. 18 U.S.C. § 1030(g).

The SCA prohibits "intentionally accessing without authorization a facility through which an electronic communications service is provided," or "intentionally exceeding an authorization to access that facility" and thereby obtaining, altering, or providing authorized access to information in such facility. 18 U.S.C. §§ 2701(a), 2707(a). And the ECPA prohibits, in pertinent part, "intentionally intercepting" any electronic communication, 18 U.S.C. § 2511(1)(a).

The plaintiffs argue that there is no material dispute of fact that Verschleiser hacked into United Realty's email servers in December 2013 and January and February 2014, and that Verschleiser thereby obtained, deleted, and intercepted electronic information and locked Frydman out of Frydman's email account, in violation of the CFAA, SCA, and ECPA. The basis for the plaintiffs' claims are data logs from the

plaintiff's Internet service provider, Intermedia.net Inc. ("Intermedia"), which they claim show access by email and IP addresses associated with Verschleiser. More specifically, the plaintiffs claim that the email addresses eli.v@urpa.com and 2good2b4@att.net accessed the server between December 2, and December 6 and 10, 2013, from IP addresses 100.2.2.26 and 108.29.11.176. The plaintiffs claim that Verschleiser, through his previous attorney, admitted to using both these email addresses and that the 102.2.2.26 IP address was used to edit Wikipedia articles associated with Verschleiser. Records subpoenaed from Verizon show that IP address 108.29.11.176 was associated with a residential address in Brooklyn that Verschleiser admitted he owned as of July 2014. The plaintiffs also claim that the Intermedia logs show further access of the plaintiffs' email server by "workstation 'ELI-X1CARBON'" and by someone using the email address 2good2b4@att.net from IP address 74.108.218.147 in January and February 2014.

With respect to Delforno, the plaintiffs contend that certain other logs, which have not been identified or authenticated, indicate that workstation RDELFORNO-X1 logged into Frydman's email account in February 2014. With respect to Onica, the plaintiffs point to a December 5, 2013, email exchange where Onica discussed contacting 1&1 Mail & Media, Inc., an email service provider, regarding technical issues. This email service provider was also used by an email address

that the plaintiffs claim sent disparaging messages about Frydman. The plaintiffs claim that Delforno and Onica met at United Realty's office in the early hours of February 12, 2014, to do "tech stuff," but Delforno testified that he did not think that he and Onica did that. With respect to Pinhasi, the record reflects that Frydman found Pinhasi working on the United Realty computer early in the morning of December 4, 2014, migrating employee profiles from United Realty's computers to Multi Group's because "we weren't allowed to remove the machines."

The defendants argue that the Intermedia records are improper because they circumvent this Court's March 24, 2017, order upholding the magistrate judge's conclusion of the plaintiffs' hacking expert, and further, that the records are unauthenticated. Both arguments are misguided. The Court explicitly stated in the March 27, 2017, order that "the plaintiffs could still, through fact evidence, attempt to prove their claims and establish damages." Frydman v. Verschleiser, 2017 WL 1155919, at *3 (S.D.N.Y. 2017). Further, a representative of Intermedia authenticated the records during his deposition. The plaintiffs can therefore offer the records on these motions.

However, the records are proffered through the declaration of the plaintiffs' attorney rather than through an expert. While this does not call into question the records'

authenticity, it does raise questions as to the correct interpretation of the records. Where the factual meaning of the records is disputed, the Court cannot resolve that factual dispute on a motion for summary judgment, and the meaning of the records is disputed. Verschleiser claims that he cannot recall whether he hacked into, or otherwise accessed, the United Realty's email servers at the times he is accused of doing so. The plaintiffs contend that this is "a nondenial" that does not raise a genuine issue of fact. However, Verschleiser appears to have accessed the servers with authorization prior to the dispute. Drawing all reasonable inferences in favor of Verschleiser, it is reasonable for Verschleiser to have difficulty recalling the precise dates of his access during the deposition three years after the access in question. In any event, the plaintiffs have the burden of showing that, as a matter of undisputed fact, Verschleiser hacked into the United Realty email system, as the plaintiffs allege, and the Court cannot decide that disputed factual issue on this motion for summary judgment.

Moreover, because the plaintiffs' evidence relates to email and IP addresses, it does not show that Verschleiser hacked into the United Realty email system as the plaintiffs allege, either because the Intermedia logs are not as conclusive as the plaintiffs' attorney believes, or because another person or persons could have used those email and IP

addresses. The plaintiffs themselves articulated the difficulty of connecting the Intermedia logs directly to Verschleiser. In the plaintiffs' brief arguing that the Court should reject the magistrate judge's preclusion of their hacking expert, the plaintiffs claimed that the expert was "essential" to their case, and further explained:

"The Intermedia logs are the digital trail of the hacking; however, in and of themselves are difficult to interpret. The logs, in total, consist of over 58,167 lines of small-font data, which, if printed, would comprise approximately 8,684 pages. (Decl., ¶ 105). As the hacking lies at the heart of this case and the Intermedia logs are the digital evidence of the hacking, the expert's report and testimony are essential to assisting the finder of fact with interpreting the data."

Plaintiffs' objection to magistrate's order precluding plaintiffs' expert (Dkt. No. 272 in 14 Civ. 5903) at 23. Without the "essential" expert, the Court cannot determine on a motion for summary judgment whether Verschleiser hacked into the plaintiffs' computer systems based on the declaration of the plaintiffs' attorney and the "difficult to interpret" log. While the plaintiffs have pointed to abundant smoke, whether Verschleiser was the arsonist remains a disputed issue of material fact for trial.

Further, the evidence in the record proffered to

implicate Delforno, Onica, and Pinhasi of hacking is, at best, attenuated. The plaintiffs point to circumstantial evidence that Delforno, Onica, and Pinhasi accessed the plaintiffs' systems from the plaintiffs' physical business location, but the plaintiffs point to no direct evidence that any of Delforno, Onica, and Pinhasi hacked the plaintiffs' computer systems.

The plaintiffs' motion for summary judgment on the defendant's liability under the CFAA, SCA, and ECPA is therefore denied.

The plaintiffs submit that the same evidence that establishes the defendants' violation of the CFAA also establishes their liability for conversion "via forwarding and deleting information from employee email accounts." Plaintiffs' memo of law in support of motion for summary judgment at 21. For the same reasons that this evidence does not entitle the plaintiffs to summary judgment on the plaintiffs' CFAA claim, it does not entitle the plaintiffs to summary judgment on their conversion claim. The plaintiffs' motion for summary judgment on the defendants' liability for conversion is therefore denied.

The plaintiffs also argue that they are entitled to summary judgment on Verschleiser's liability for tortious interference with prospective contractual or business relations. Under New York law, to prevail on this claim, a

plaintiff must show that "(1) it had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice, or used dishonest, unfair, or improper means; and (4) the defendant's interference caused injury to the relationship." Kirch v. Liberty Media Corp., 449 F.3d 388, 400 (2d Cir. 2006) (internal quotation marks and citation omitted). The plaintiffs claim that the evidence in the record establishes that Verschleiser anonymously emailed Opera, a prospective sublessor of office space to the plaintiffs, using the email address informedconsumer@mail.com and made "false and defamatory accusations" against Frydman, thereby causing Opera to decline to execute the contemplated sublease with the plaintiffs. Plaintiffs' motion for summary judgment at 22. The plaintiffs attempt to link Onica to the informedconsumer@mail.com because Onica sent an email contemplating contacting the email service provider of that email address about a different matter.

The plaintiffs claim that the metadata from the email to Opera shows that it was sent from IP address 173.254.227.108 and that the Intermedia logs show that this IP address also logged into United Realty's servers and accessed accounts associated with Verschleiser. The plaintiffs further allege that Verschleiser could only have learned of the Opera lease through hacking and could only have been motivated by malice.

The plaintiffs also contend that email messages between Opera employees establish that the lease would have been executed but for the email from informedconsumer@mail.com. According to the plaintiffs, this establishes that Verschleiser knew of and interfered with the plaintiffs' potential sublease by unfair means, which caused the sublessor to pull out of the deal.

The defendants argue that the plaintiffs' attempt to link Verschleiser to the 173.254.227.108 IP address is circumstantial, that Verschleiser could have learned of the deal from sources other than hacking and had motivations other than malice, that the plaintiffs have not demonstrated that the accusations about Frydman in the email are not true, and that the plaintiffs have not established that the lease would have been executed but for the email from informedconsumer@mail.com.

Just as the plaintiffs' attorney's declaration fails to show as a matter of undisputed material fact that Verschleiser hacked into United Realty's servers, it also does not show that Verschleiser sent the email from informedconsumer@mail.com. Verschleiser claims that he cannot recall whether he ever used that email address. Further, the plaintiffs' contention that whoever sent the email could only have learned of the lease through hacking is conclusory and unsupported because the records indicate that several employees of Opera were involved and could have related the information to others unbeknownst to the plaintiffs. Moreover, the

sender's motivations, the truth of the accusations, if any, and their effect on Opera are all questions of fact that cannot be decided on a motion for summary judgment.

The plaintiffs' motion for summary judgment on their claim for tortious interference is therefore denied.

The plaintiffs also argue that they are entitled to summary judgment on their claim for breach of contract with respect to the server restoration, nondisparagement, nonsolicitation, and confidential provisions of the December 3, 2013, agreement, including that the alleged breaches were material.

The agreement obligates Verschleiser to return various computer servers to their status as of November 15, 2013, and to turn over all owner and administrator passwords for the plaintiffs' computer systems to Frydman by December 5, 2013. The defendants concede that Verschleiser did not perform these obligations within the required time period but argue that such nonperformance was not a material breach of the agreement.

"Whether a failure to perform constitutes a material breach turns on several factors, such as the absolute and relative magnitude of default, its effect on the contract's purpose, willfulness, and the degree to which the injured party has benefitted under the contract." Process Am., Inc. v. Cynergy Holdings, LLC, 839 F.3d 125, 136 (2d Cir. 2016) (quoting Hadden v. Consol. Edison Co. of New York, 312 N.E.2d

445 (N.Y. 1974)). The plaintiffs' contention that because the agreement "was in its infancy, Verschleiser's nonperformance was of great magnitude" is not supported by any factual evidence in the record. Moreover, the record indicates that Verschleiser was dealing with a family emergency surgery at the time, and this was the reason he did not meet his obligations. Whether Verschleiser's failure to meet his obligations within the agreement's time frame was excused by exigency -- and whether it was material -- are factual questions that cannot be determined on a motion for summary judgment. See Cont'l Ins. Co. v. RLI Ins. Co., 555 65 N.Y.S.2d 325, 327 (App. Div. 1990) ("Ordinarily, the question of the materiality of a breach of warranty in an insurance contract is a question of fact for the jury.").

The plaintiffs also claim that they are entitled to summary judgment on Verschleiser's breach of the agreement's nondisparagement provision. The plaintiffs point to emails Verschleiser sent beginning on April 14, 2014, that are allegedly derogatory. The agreement stipulates that any breach of the nondisparagement provision will be considered material.

However, prevailing on a breach of contract claim requires proving not only that Verschleiser breached his obligation but also that Frydman substantially performed and did not materially breach his. Process Am., Inc., 839 F.3d at 136. The defendants do not dispute that Verschleiser sent the

emails in the record, but they contend that Verschleiser was excused from performance because Frydman had failed to make the distributions required by the agreement and because Frydman disparaged Verschleiser on a website called thetruthaboutEliVerschleiser.com. There are disputed issues of fact as to when Frydman began to disparage Verschleiser. Who disparaged whom first -- breaching the agreement and excusing the other party's performance -- is a disputed factual question that cannot be decided on a motion for summary judgment.

The plaintiffs also contend that they are entitled to summary judgment that Verschleiser breached the agreement's nonsolicitation provision by employing or soliciting two employees of the plaintiffs after the execution of the agreement. The defendants dispute whether any such employment took place after the signing of the agreement and whether the persons in question were employees or independent contractors. Contrary to the plaintiffs' belief, the portion of deposition testimony the plaintiffs cite to prove the employment or nonsolicitation question are far from conclusive. Further, if Frydman breached the agreement by disparaging Verschleiser through thetruthaboutEliVerschleiser.com prior to any employment or solicitation, such employment or solicitation could be excused. Process Am., Inc., 839 F.3d at 136. Whether the defendants breached the nonsolicitation provision of the agreement is therefore a factual question for trial.

The plaintiffs also claim that they are entitled to summary judgment on Verschleiser's breach of the agreement's confidentiality provision based on Verschleiser's disclosure of the Opera sublease transaction. The plaintiffs cite "the same evidence that supports summary judgment in favor of United Realty on so much of its tortious interference claims as concerns the Opera Realty failed deal" to support this contention. Plaintiffs' motion for summary judgment, at 28. As discussed above, the plaintiffs have failed to demonstrate that they are entitled to summary judgment concerning the alleged interference with the Opera transaction. The plaintiffs have likewise failed to establish a breach of the agreement's confidentiality provision based on the same evidence.

Therefore, the plaintiffs' motion for summary judgment on Verschleiser's alleged breaches of the agreement is denied.

The plaintiffs also argue that they are entitled to summary judgment on their claim of misappropriation of trade secrets. The basis for this claim is that Akerman, at Verschleiser's behest, obtained from CLS's and the plaintiffs' computer servers certain information that he provided to Verschleiser, including a confidential sale and purchase agreement, known as the transaction agreement, for the sale of CLS's retail customer accounts, a list of the REIT's shareholders who were clients of CLS, a list of broker-dealers

and representatives who formed part of the United Realty selling group in conjunction with the public offering of the REIT's common stock, and financial reports related to CLS's performance.

The defendants contend that the record does not prove that all of this information was actually sent to Verschleiser and that the plaintiffs lack standing to bring claims with respect to CLS's alleged trade secrets because they are no longer owners of CLS and have not shown that they are assignees of CLS's claims, if any. The plaintiffs respond that much of the information, including the transaction agreement, relates to United Realty and to Prime United Holdings, who was a party to the transaction agreement, and that they therefore have standing to pursue all of their claims.

Whether the plaintiffs have standing to bring claims for misappropriation of trade secrets related to the transaction agreement depends in part on whether the transaction agreement to which Prime United Holding was a party, constitutes a trade secret. Likewise, whether all, or any, of the other alleged proprietary information actually constitutes trade secrets is a factual question necessitating a close analysis of the specific information and the context in which it was obtained and used. See N. Atl. Instruments, Inc. v. Haber, 188 F.3d, 38, 44 (2d Cir. 1999) (listing six factors New York courts consider when determining whether information

constitutes a trade secret); A.F.A. Tours, Inc. v. Whitchurch, 937 F.2d 82, 89 (2d Cir. 1991) ("The question of whether or not a customer list is a trade secret is generally a question of fact."). Thus, whether the defendants misappropriated trade secrets of the plaintiffs is a factual question to be determined at trial.

The plaintiffs' motion for summary judgment on their claim for misappropriation of trade secrets is therefore denied.

In sum, the plaintiffs' motion for summary judgment is denied in its entirety.

The defendants also move for summary judgment dismissing all of the plaintiffs' claims. Although the defendants purport to move for summary judgment as to all of plaintiffs' claims, the defendants make no argument in favor of dismissing the plaintiffs' claim for misappropriation of trade secrets or breach of contract. The defendants' motion as to those claims, if any, is therefore denied. For the following reasons, the defendants' motion with respect to the plaintiffs' other claims is also denied.

The defendants' motion for summary judgment is little more than a reprise of their motion to dismiss, which the Court denied. See Frydman v. Verschleiser, 172 F.Supp. 653. In their reply papers, the defendants also raise a new argument -- that the Court should dismiss the plaintiffs' claims based on

judicial estoppel. "The Court will not consider new arguments in reply papers." PrecisionIR Inc. v. Clepper, 693 F.Supp.2d 286, 297 (S.D.N.Y. 2010).

The defendants' main argument is that the plaintiffs have not adequately pleaded their RICO claims. Plainly, this is not an argument conducive to motion for summary judgment. As the plaintiffs correctly observe, the defendants "cut and paste entire sections from their August 28, 2015, memorandum of law in support of their failed motion to dismiss" these claims for lack of standing. Plaintiffs' opposition at 2. See also defendants' memo of law in support of motion for summary judgment at 10 (arguing that the plaintiffs have "failed to meet their burden under the Rule 8(a) pleading standard"); defendants' motion for summary judgment at 12 (arguing that the plaintiffs "do not allege" detrimental reliance on allegedly fraudulent activity); defendants' memo of law in support of motion for summary judgment at 13 (arguing that the plaintiffs' RICO claims fail under the pleading standards of Fed. R. Civ. P. 9(b)); defendants' memo of law in support of motion for summary judgment at 16 (arguing that the plaintiffs have failed to allege an enterprise for RICO purposes); defendants' memo in support of motion for summary judgment at 17-18 (arguing that the plaintiffs have failed to allege a pattern of racketeering activity). These are pleading arguments that have already been rejected. Even when purporting to argue that the plaintiffs

have failed to prove racketeering activity, an argument which is more suited to a motion for summary judgment, the defendants shift to an argument based on the plaintiffs' alleged failure to meet the pleading standard. See defendants' motion in support of summary judgment at 19-22. To the extent the defendants argue that the plaintiffs "failed to provide evidence" of the injuries required to prove standing for the RICO claims, the record demonstrates an issue of fact as to whether investors pulled out of Frydman's businesses and whether Opera pulled out of the prospective sublease agreement due to alleged disparagement by Verschleiser.

For the reasons stated in the Court's order denying defendants' motion to dismiss, the defendants' motion for summary judgment dismissing the plaintiffs' RICO claims is denied.

The defendants also move for summary judgment dismissing the plaintiffs' hacking claims under the CFAA, SCA, and ECPA. The defendants argue that the plaintiffs have not proffered any "admissible" evidence that Verschleiser or the other defendants hacked into, or otherwise accessed, without authorization the plaintiffs' computer servers.

The Court has not ruled that the Intermedia logs are inadmissible and the plaintiffs have proffered some evidence of authentication. The logs cannot be rejected as inadmissible at this point. Further, the record plainly raises a question of

fact as to whether Verschleiser hacked into the plaintiffs' servers. For example, the logs purport to show access to the plaintiffs' servers by someone using the email address 2good2b4@att.net and IP address 108.29.11.176. The record offers some support to the plaintiffs' contention that this IP address was associated with a residence owned by Verschleiser. Verschleiser's previous attorney advised the plaintiffs that Verschleiser used the email address 2good2b4@att.net. Drawing all inferences in the plaintiffs' favor, as the Court is required to do on the defendants' motion, the record demonstrates a material issue of fact as to whether Verschleiser hacked into the plaintiffs' computer systems.

Further, the defendants' contentions that the plaintiffs cannot prove that the defendants lack authority to access the servers or that the defendants, believing they had such authority, acted with the requisite knowledge or intent to access the servers, are conclusory allegations. Whether the defendants had such authorization or acted with the requisite mental state are quintessential questions of fact to be answered at trial. See United States v. Rajaratnam, 719 F.3d 139, 153 (2d Cir. 2013) ("Whether an individual had a particular mental state 'is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence'") (quoting Farmer v. Brennan, 511 U.S. 825, 842 (1994)). (There is thus sufficient evidence in

the record to suggest hacking by Verschleiser to withstand the defendant's motion for summary judgment dismissing the plaintiffs' claims under the CFAA, SCA, and ECPA.

The defendants' motion for summary judgment dismissing the plaintiffs' federal hacking claims is therefore denied.

Finally, the defendants move for summary judgment dismissing the plaintiffs' state law tort claims for libel tortious interference with prospective contractual or business relations, and intentional infliction of emotional distress. Essentially, the defendants argue that Frydman cannot prove harm from any disparaging information expressed or disclosed about him because his public reputation is so bad that Frydman is "libel proof." Although the Second Circuit Court of Appeals has "recognized that a plaintiff's reputation with respect to a specific subject may be so badly tarnished that he cannot be further injured by allegedly false statements on that subject," the Court of Appeals has explained that "the libel-proof plaintiff doctrine is to be applied with caution since few plaintiffs will have so bad a reputation that they are not entitled to obtain redress for defamatory statements." Guccione v. Hustler Magazine, Inc., 800 F.2d 298, 303 (2d Cir. 1986) (citations omitted); see also Buckley v. Littell, 539 F.2d 882, 889 (2d Cir. 1976) (cautioning against extending the libel-proof doctrine, first enunciated in Cardillo v. Doubleday & Company, 518 F.2d 638 (2d Cir. 1975), beyond Cardillo's

"basic factual context."). While the record does suggest that Frydman is litigious and has been the subject of negative statements apart from this lawsuit, whether Frydman was harmed by the defendants' alleged statements and disclosures -- including allegedly private emails sent to current or prospective business partners -- is a question of fact to be answered at trial. The defendants' motion for summary judgment dismissing the plaintiffs' state law tort claims is therefore denied.

In sum, the defendants' motion for summary judgment is denied.

The Court has considered all of the arguments raised by the parties. To the extent not specifically addressed, the arguments are either moot or without merit. For the foregoing reasons, both the plaintiffs' and the defendants' motions for summary judgment, with the exception of the motion by defendant Akerman, are denied. Based on this decision, the clerk of court is directed to close all pending motions except Dkt. No. 212 in 14 Civ. 8084.

So ordered.

Akerman's motion is different, and I will briefly go over the Akerman motion. I'll actually do a written decision with respect to Akerman shortly, perhaps today, certainly very shortly. This will be a much shortened description of the resolution of the Akerman motion, which will be expanded on in

the written decision.

The third motion for summary judgment is brought by Akerman. The plaintiffs' consolidated second amended complaint ("CSAC") alleges 20 federal and state law counts, nine of which name Akerman as a defendant: violation of the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. §§ 1961 et seq. ("RICO") (Count One); conspiracy to violate § 1962(c) of RICO; 18 U.S.C. § 1962(d) (Count Two); libel per se, (Count Eight); trade libel (Count Nine); misappropriation of trade secrets (Count Eleven); tortious interference with existing contractual or business relations (Count Twelve); breach of contract (Count Sixteen); indemnification (Count Seventeen); and breach of the duty of loyalty (Count Eighteen). Akerman's motion for summary judgment seeks dismissal of all counts against Akerman based on contractual release and the collateral estoppel effect of a prior arbitration. For the reasons explained below, Akerman's motion for summary judgment is granted.

As relevant to Akerman's motion for summary judgment, the record and undisputed representations of the parties show the following facts as to which there is no genuine dispute.

Part of the plaintiffs' allegations in this case are that Akerman provided confidential and trade secret information to Verschleiser, another defendant, after Verschleiser and Frydman's business partnership ended in December 2013. Until mid-December 2014, Akerman was the chief compliance officer

("CCO") of Cabot Lodge Securities LLC ("CLS"), a broker-dealer registered with the United States Securities and Exchange Commission ("SEC") and a member of the Financial Industry Regulatory Authority ("FINRA"). Akerman was also CCO for CL Wealth Management LLC ("CLW"), an investment adviser registered with the SEC and an affiliate of CLS. At the time, Prime United Holdings, one of the plaintiffs in this lawsuit, owned CLS. Frydman, also a plaintiff in this lawsuit, is the chief executive officer ("CEO") and chairman of Prime United Holdings and the chairman of CLS and CLW. CSAC ¶ 48. On or around December 15, 2014, Frydman fired Akerman from CLS and CLW.

After Akerman's termination from CLS and CLW, Akerman and Frydman asserted various claims against each other in New York State court. Akerman also sent a letter to the SEC, among other parties, alleging wrongdoing related to the management of CLS. On or about January 14, 2015, CLS and CLW filed a Form U-5 with FInRA containing allegations of misbehavior against Akerman. The Form U-5 is a uniform termination notice for securities industry registration.

On February 20, 2015, Akerman executed a settlement agreement (the "agreement") with CLS, Frydman, and United Realty, whereby each party released the others from all claims relating to events prior to and including February 20, 2015 (the "release"). Specifically, the release provided, in relevant part, that subject to Akerman's faithful performance

of his obligations in paragraphs 1, 2, and 3, and subject to certain exceptions not here relevant:

United Realty; CLS, United Realty Trust Incorporated, Frydman and each of their respective agents, representatives and affiliates (the "United releasing persons") hereby release any and all claims, suits, controversies, actions, causes of action, cross-claims, counterclaims, demands, debts, compensatory damages, liquidated damages, punitive or exemplary damages, other damages, claims for costs and attorneys' fees, or liabilities of any nature whatsoever in law and in equity, both past and present, whether known or unknown, suspected, or claimed against Akerman and each and every one of his affiliates, and each of their respective successors or assigns, which the United releasing persons ever had, now have, or hereafter may have, by reason of any matter, cause, or thing whatsoever, from the beginning of the world to the time of execution of this agreement. This relief will survive the transactions contemplated herein. In the event that Akerman breaches the provisions of paragraphs 1, 2, or 3, the release provided in this paragraph 4 shall be null and void ab initio.

Paragraphs 1 and 3 of the agreement obligated Akerman to send a retraction letter to the SEC and discontinue the state court lawsuit against Frydman by February 20, 2015. Paragraph 2 of the agreement obligated Akerman to refrain from soliciting any employees of the United releasing persons,

divulging confidential information of the United releasing persons, communicating with any agency about the United releasing persons, or disparaging the United releasing persons. However, the agreement provided that the United releasing persons would not oppose Akerman's initiation of arbitration with FInRA to expunge the Form U-5 letter as long as Akerman did not seek "affirmative relief."

On or about February 25, 2015, Akerman initiated arbitration with FInRA, seeking to expunge the Form U-5. On March 18, 2015, CLS and CLW filed an answer, affirmative defenses, and counterclaims with FInRA -- which was signed by Frydman -- seeking damages against Akerman in excess of $8 million. Akerman moved the FInRA arbitrators to strike the answer and to dismiss the counterclaims because the counterclaims were barred by the release in the agreement. CLS and CLW responded by arguing that the release was void because Akerman had breached the agreement by disparaging CLS and CLW and seeking affirmative relief with respect to the Form U-5. On November 17, 2015, the FInRA arbitration panel issued an order striking the answer by CLS and CLW and dismissing the counterclaims. The arbitrators found that Akerman had not sought affirmative relief by seeking to expunge the Form U-5. The arbitrators also determined that CLS, and CLW as an affiliate of CLS, had "released any and all claims in dispute by a signed settlement agreement and a written release."

On February 16, 2016, Akerman moved this Court for summary judgment dismissing the plaintiffs' claims against Akerman. Akerman argued that there was no genuine dispute, that he had not breached the agreement, and the release therefore barred the plaintiffs' claims against him in this case. The plaintiffs responded that there were numerous disputed issues of material fact with respect to Akerman's performance (or lack thereof) under the agreement that precluded summary judgment. On June 30, 2016, the Court denied Akerman's motion for summary judgment on the ground that there remained disputed facts as to whether Akerman had breached the agreement and thus whether plaintiffs' claims were barred by the release.

Thereafter, on July 11, 2016, Akerman amended his answer to include a new affirmative defense, collateral estoppel. See Dkt. No. 155 in 14 Civ. 5903. On April 28, 2017, Akerman again moved this Court for summary judgment dismissing all of the plaintiffs' claims. This time, Akerman argues that the FInRA arbitration order precludes plaintiffs from arguing that Akerman breached the agreement or from contesting the enforceability of the release. If the plaintiffs were so precluded, there would be no factual dispute that Akerman complied with the agreement and can rely on the release.

It is not necessary to repeat the standards to be

applied on a motion for summary judgment. See, generally, Scotto v. Almenas, 143 F.3d 105, 14-15 (2d Cir. 1998); Ying Jing Gan v. City of New York, 996 F.2d 522, 532 (2d Cir. 1993); Abrams v. RSUI Indemnity Co., No. 16 Civ. 4886 (JGK), 2017 WL 3433108, at *3 (S.D.N.Y. Aug. 10, 2017).

Akerman moves for summary judgment. Akerman contends that by the February 20, 2015, agreement, the plaintiffs released all of the claims asserted against Akerman in this case, which pertain to events preceding February 20, 2015. Akerman argues that the FInRA arbitration panel ruled that the agreement is binding and therefore the doctrine of collateral estoppel precludes the plaintiffs from now arguing otherwise.

The doctrine of collateral estoppel may preclude a party, or its privy, from relitigating an issue that the party previously litigated and lost. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329 (1979); Blonder-Tongue Labs, Inc. v. Univ. of Illinois Found., 402 U.S. 313, 320-21 (1971). District courts have broad discretion to determine when collateral estoppel should be applied. Parklane Hosiery, 439 U.S. 331. The Second Circuit Court of Appeals has explained that a prior arbitration may have preclusive effect where:

"(1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had full and fair opportunity to litigate the issue; and (4) the resolution of

the issue was necessary to support a final and valid judgment on the merits." Bear, Stearns & Co., Bear, Stearns Sec. Corp. v. 1109580 Ontario, Inc., 409 F.3d 87, 91 (2d Cir. 2005) (internal quotation marks and citations omitted). Additionally, "a court must satisfy itself that application of the doctrine is fair." Id.

The plaintiffs contend that the FInRA arbitration does not have a preclusive effect in this litigation and that the Court's previous determination that the Court is not bound by the FInRA arbitration is "law of the case." The plaintiffs also suggest that the FInRA arbitration should not be given preclusive effect because the arbitrators did not explicitly find that Akerman did not breach the agreement. Further, the plaintiffs argue that, even if the FInRA arbitration could have a preclusive effect, it does not have the effect in this case because the respondents in the arbitration are not identical to, nor in privity with, the plaintiffs in this litigation.

The plaintiffs contend that the Court's prior determination that Akerman was not entitled to summary judgment because a fact dispute existed regarding whether Akerman had violated the agreement is law of the case. This argument is misguided. "The law of the case doctrine commands that when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case unless cogent and compelling reasons militate otherwise."

Johnson v. Holder, 564 F.3d 95, 99 (2d Cir. 2009) (internal quotation marks omitted). However,

"unlike the doctrines of *res judicata* and collateral estoppel, which a court cannot ignore where they apply, the law of the case, as Justice Holmes remarked, 'merely expresses the practice of the courts generally to refuse to reopen what has been decided'... [and] is, at best, a discretionary doctrine which does not constitute a limitation on the court's power but merely expresses this practice." Devilla v. Schriver, 245 F.3d 192, 197 (2d Cir. 2001) (internal quotation marks, citations, and brackets omitted).

Further, the issue of collateral estoppel has not previously been raised with respect to the FInRA arbitration. Rather, Akerman previously argued that there was no genuine fact dispute that Akerman had not breached the agreement and that he was therefore entitled to summary judgment dismissing all of the plaintiffs' claims. In the plaintiffs' opposition to Akerman's earlier motion for summary judgment, the plaintiffs asserted that numerous fact disputes existed over whether Akerman breached the agreement, precluding summary judgment. The Court denied Akerman's motion for summary judgment on that ground. Akerman had not raised a defense of collateral estoppel, although the Court may have inquired about that issue at argument. That defense was not resolved on the prior motion. Akerman did not amend his answer to include

collateral estoppel as an affirmative defense until after the Court had ruled on its first motion for summary judgment. Akerman's current motion for summary judgment seeks to preclude the plaintiffs from making the argument on which the plaintiffs prevailed in their earlier opposition to Akerman's motion for summary judgment. Akerman does not seek to relitigate the same issues of fact.

Law of the case is a discretionary doctrine, and this Court could reconsider a prior ruling. In any event, because Akerman now raises a new issue, the doctrine of the law of the case does not foreclose Akerman's argument of collateral estoppel.

The plaintiffs also contend that, even if collateral estoppel applies in this case, the FInRA arbitration should not be given preclusive effect because the arbitrators did not expressly find that Akerman had not breached the agreement. However, there is no requirement that the issue over which preclusion is sought have been the subject of an express finding of fact. Rather, as the Second Circuit Court of Appeals explained, the question is whether "the resolution of the issue is necessary to support a valid and final judgment on the merits." Bear, Stearns & Co., 409 F.3d at 91.

Here, it is clear that the resolution of the contested issue -- whether Akerman breached the agreement, thereby voiding the release -- was necessary to support the

arbitrators' ruling dismissing counterclaims by CLS and CLW and enforcing the release. The counterclaims by CLS and CLW echo the claims in this case alleging a history of abuses by Akerman from mid-2014 into 2015 against CLS and CLW, including conspiring with Verschleiser to steal secrets, and to commit defamation, libel, tortious interference with existing and prospective business relations, and other torts and violations of federal laws. Akerman responded by relying on the release contained in the agreement. Akerman argued: "The counterclaims against Akerman should be dismissed because the claims against him are barred by the release and therefore fail to state a cause of action against him." In opposing Akerman's motion to dismiss the counterclaims, CLS and CLW specifically argued, in detail, that "Akerman breached the agreement rendering the release null and void *ab initio*." To find the agreement's release controlling, the arbitrators necessarily had to reject the argument by CLS and CLW that Akerman had breached the agreement. The arbitrators also specifically rejected CLS and CLW's contention that Akerman had sought "affirmative relief," in violation of the agreement, by seeking to expunge the Form U-5.

The plaintiffs cite In re S.W. Bach & Co., 425 B.R. 78 (Bankr. S.D.N.Y. 2010) to support their argument that courts sometimes decline to give collateral estoppel effect to arbitration rulings that lack findings of fact. That case is

distinguishable. In S.W. Bach & Co., the bankruptcy court stayed a pending arbitration precisely because "it is possible that collateral estoppel would apply such that this Court would be deprived of its necessary jurisdiction over the 11 U.S.C. § 548 fraudulent conveyance claim." Id. at 102, the S.W. Bach & Co. court pointed to another bankruptcy case, In re Klein, Maus & Shire, Inc., 301 B.R. 408 (Bankr. S.D.N.Y. 2003), to explain that some courts decline to grant preclusive effect to arbitration rulings that have not made or adopted findings of fact. In Klein, Maus & Shire, Inc., however, the court determined that it could not give preclusive effect to an arbitration ruling because the complaint before the arbitrator contained multiple causes of action seeking identical relief, and the court could therefore not determine the basis (or bases) of the arbitration award. In re Klein, Maus & Shire, Inc., 301 B.R. at 416-17. In this case, by contrast, the resolution of the disputed issue was necessarily reached. The arbitrators' ruling that the agreement's release required dismissal of the counterclaims by CLS and CLW necessarily required the arbitrators to find, over the vigorous objection of CLS and CLW, that Akerman had not breached the agreement.

Generally, the doctrine of collateral estoppel only has preclusive effect on the parties against whom the issue was decided or their privies. See Blonder-Tongue Labs, Inc., 402 U.S. 320-21.

The three plaintiffs in this claim who have sued Akerman are Frydman, United Realty, and Prime United Holdings. The entities in the arbitration against Akerman were CLS and CLW. Akerman contends that the requirement of privity is met because Prime United Holdings owned CLS and is a plaintiff in this case. Moreover, Akerman argues that Frydman, the CEO and chairman of Prime United Holdings, was the true driving force behind the arbitration. Frydman is also the assignee of the claims of United Realty and Prime United Holdings. The plaintiffs argue that the privity requirement is not met between the parties to the arbitration and the plaintiffs in this case because "certain affiliates of Frydman" sold their interest in United Realty midway through the arbitration and because different attorneys represented the parties in the arbitration and the plaintiffs in this case.

The plaintiffs' arguments have no merit. Generously construed, the plaintiffs argue that precluding United Realty from relitigating the agreement's release would be unfair because United Realty was not a party to the arbitration, and the plaintiffs allege that, as of September 15, 2015 -- three weeks before CLS and CLW submitted the counterclaims to the arbitration -- Frydman no longer owned United Realty. However, "complete privity" is not required for a party to have been adequately represented in a previous proceeding. See M.O.C.H.A. Soc'y, Inc. v. City of Buffalo, 689 F.3d 263, 285

(2d Cir. 2012) ("Despite the absence of complete privity between the named plaintiffs in the two actions, sufficient identity exists between the plaintiffs for the district court to apply collateral estoppel and to bar litigation" of the previously decided issue.) (internal quotation marks omitted). The interests of all the plaintiffs in the current action -- Frydman, United Realty, and Prime United Holding -- were all adequately represented in the arbitration and all had the same interest in invalidating the agreement and the release.

Moreover, Frydman owns the litigation claims of United Realty and Prime United Holdings. Those entities will therefore lose nothing by not litigating Akerman's release because Frydman is the only person who stands to benefit from invalidating the release. And not only did Frydman control the respondents to the arbitration by virtue of being the CEO and chairman of Prime United Holdings, which owned CLS, but Frydman personally litigated much of the arbitration, including signing the counterclaims at issue on behalf of the respondents in the arbitration. There is no doubt that the plaintiffs in this case are in privity with, and were adequately represented by, the respondents in the arbitration.

Therefore, the doctrine of collateral estoppel precludes the plaintiffs from contesting the enforceability of the agreement or the release.

"New York law favors enforcement of valid releases."

Spanski Enterprises Inc. v. Telewizja Polska, S.A., No. 10 Civ. 4933 (ALC) (GWG), 2013 WL 81263 at *4 (S.D.N.Y. Jan. 8, 2013) (collecting cases). "An unambiguous release 'should be enforced according to its terms.'" Krumme v. WestPoint Stevens Inc., 238 F.3d 133, 144 (2d Cir. 2000) (quoting Booth v. 3669 Delaware, 703 N.E.2d 757, 758 (N.Y. 1998)). The February 20, 2015, agreement between Akerman and Frydman contained a broad release of all claims the plaintiffs "ever had, now have, or hereafter may have, by reason of any matter, cause, or thing whatsoever, from the beginning of the world through the time of execution of this agreement." All of the claims against Akerman in this case relate to events prior to February 20, 2015, the date of the agreement and the release. Because the release is unambiguous and because plaintiffs are precluded by the doctrine of collateral estoppel from arguing that Akerman breached the agreement Akerman is entitled to summary judgment dismissing all of the plaintiffs' claims against him. Indeed, the arbitration panel correctly dismissed the counterclaims in the arbitration, which asserted similar claims to those now played by plaintiffs in this case against Akerman.

Akerman's motion for summary judgment dismissing all of the plaintiffs' claims against him is therefore granted.

The Court has considered all of the arguments raised by the parties. To the extent not specifically addressed, the arguments are either moot or without merit. For the foregoing

reasons, the motion for summary judgment by defendant Akerman is granted. All claims against defendant Akerman are dismissed.

With this decision, the final outstanding motion is denied, so the clerk of court will be directed to close all pending motions in both 14 Civ. 8084 and 14 Civ. 5903. And as I said, I'll issue a written decision incorporating what I said with respect to Akerman.

I realize now that there is an outstanding motion to withdraw as counsel by Eric Feinstein for some of the plaintiffs. I have referred that motion to withdraw and the charging lien to the magistrate judge. I hope that that will be resolved promptly. Some time is necessary to prepare the joint pretrial order, motions *in limine*, requests to charge, voir dire. And if the motion is granted, there would then be the need for new counsel, so I would think that a reasonable time to submit the joint pretrial order, motions *in limine*, requests to charge, voir dire, is about two months.

Joint pretrial order and the other filings are due February 2, 2018. Responses and objections are due February 9. The case is on the ready trial calendar, 48 hours' notice, February 23, 2018.

I'll incorporate the scheduling order into a separate order. All right?

Thank you, all. Is there anything else for me?

MR. KIMLER: Thank you, your Honor.

MR. FISCHBEIN: Thank you, your Honor.

THE COURT: Does anyone want to talk to the magistrate judge about the possibility of settlement? If you do, I'll put in the order that if anyone wishes a reference to the magistrate judge for purposes of settlement, they should advise the Court, but I'm not going to automatically send you to the magistrate judge unless there is an indication that it would not be a waste of the magistrate judge's time.

OK.

MR. GULKO: The last thing that you had mentioned was February 23.

THE COURT: Yes.

MR. GULKO: Two points. One is I'm actually scheduled to be on a family vacation that weekend and so I know that we're not sure yet, but is there any way that we could add a week, it would be very helpful.

THE COURT: I'm not inclined to change the ready trial date. The ready trial date is a date that is a definite date in the sense that you are subject to call at that point on 48 hours' notice, so you have to keep my chambers advised. If you have a firm trial commitment in another case or a vacation that is otherwise definitely planned, tickets bought, whatever, if that's true, you let me know and I won't call you for that period, but if you get called at any time after the ready trial

date and you tell me that for the first time you have another commitment or you have a vacation, then I won't recognize it unless you'd told me before. It's perfectly fine to put in a letter what your commitments are, and I'll honor those if they're told to me in advance, before you're actually called to trial.

MR. GULKO: OK. That's fine, your Honor. I'll tell you now so it's on the record, but as we get closer I'll remind the Court by letter as well.

THE COURT: Fine.

MR. GULKO: I do have tickets already booked for the 22nd through the 27th.

THE COURT: I'll tell you what -- you've told me you have tickets, fine -- 48 hours' notice as of March 2, 2018.

MR. GULKO: Thank you, your Honor.

THE COURT: And if there's any desire to talk to the magistrate judge about settlement, simply put that in a letter to me and I will make sure that that gets to the magistrate judge. I think I have already referred it for general pretrial to the magistrate judge, so I will just alert the magistrate judge that you want to talk about settlement. OK?

MR. GULKO: Thank you, your Honor.

THE COURT: All right. Thank you, all. Bye now.

(Adjourned)